FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 7, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 99-79
Petitioner	:	A. C. No. 46-01453-04249
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Humphrey No. 7 Mine

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
Elizabeth S. Chamberlin, Esq., 1800 Washington Road, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor against the Consolidation Coal Company (Consol) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging two violations of mandatory standards and seeking civil penalties of $10,500.00 for those violations. The general issue before me is whether Consol committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

Order No. 7102307, issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:[1]

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[1] Section 104(d)(2) of the Act provides as follows:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

> On the 2 north panel, from crosscuts 4 to 3, 3 to 2 and 2 to 1 entries, coal spillage has not been cleaned during the normal mining cycle. The spillage measures from 6 inches to 24 inches deep. This spillage is along the ribs and in the center of the crosscuts. From the 6 to 7 entries and down the No. 7 entry for 90 feet and down the No. 6 entry for 90 feet, loose coal spillage measuring up to 36 inches deep along the ribs and in the center of said entries. The operator's clean-up program is not being followed on the 2 north panel.

The cited standard, 30 C.F.R. § 75.400, provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered electric equipment therein."

Timothy Reseter has been an inspector for the Mine Safety and Health Administration (MSHA) since 1992. He has an additional 20-years experience as an underground miner with the last ten years as a foreman. On October 27, 1998, he reported to the Humphrey No. 7 Mine to conduct an inspection.[2] He examined the preshift examination records for the 2 Mains North Section between 6:45 a.m. and 7:30 a.m. and found that no spillage had been reported. Reseter thereupon proceeded to inspect the 2 Mains North Section.

This was a continuous miner section with seven entries and three working shifts. The day and afternoon shifts were producing shifts, and the midnight shift was a maintenance shift in which no coal was mined. The left side of the section consisted of entries one through four, and the right side of the section consisted of entries five through seven. As of the morning of October 27, 1998, the section had been roof bolted except for a small area in the crosscut between the No. 2 entry and the No. 1 entry, and part of the No. 7 entry inby the last open crosscut .

According to Inspector Reseter there were coal accumulations on the left side of the section in the last open crosscuts from the No. 4 to No. 3 entry, No. 3 to No. 2 entry, and No. 2 to No. 1 entry, from rib to rib. The accumulations on the left side of the section were measured at 3 to 24 inches deep. In addition, two places on the left side had 36 inches of coal spillage where the corners had been bulldozed. Acting mine foreman Charlie Harper confirmed that five corners had been bumped on the left side of the section resulting in spillage up to two feet deep. According to Reseter, the spillage on the left side of the section was mostly dry with little rock dust on top.

On the right side of the section, Reseter found coal spillage from rib to rib in the last open crosscuts from the No. 5 to the No. 6 entry, and from the No. 6 entry to the No. 7 entry. Reseter also found accumulations of up to 36 inches in the No. 6 and No. 7 entries for a distance of 90 feet outby the last open crosscuts. Reseter testified that these accumulations on the right side were dry except for the area 90 feet outby the last open crosscuts. There seems to be no dispute

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[2] It has been stipulated that the Humphrey No. 138 Mine referenced by other witnesses corresponds to the same area as the Humphrey No. 7 Mine described herein.

that the coal accumulations found by Reseter had been created by mining done on the afternoon shift and the day shift of the previous day.

I find inspector Reseter's testimony concerning the size and consistency of the cited accumulations to be completely credible and sufficient to sustain the violation as charged. In reaching this conclusion I have not disregarded the testimony of Consol's witnesses that much of the cited coal spillage was wet. I also note however that Jimmy Brock, then assistant mine superintendent, testified that although much of the the cited coal was mixed with mud and was wet in certain areas, there was another layer of apparently dry coal 3 to 6 inches deep on top of that in some areas. Brock also acknowledged that not all the entries were wet. However even assuming, *arguendo*, that the cited coal accumulations were at least partially wet, the Commission has held that that does not render it incombustible. *See Utah Power & Light Company,* 12 FMSHRC 905 at 969 (May 1990) and *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117 (August 1985).

The Secretary also alleges that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
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> *See also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In arguing that the violation herein was "significant and substantial" the Secretary relies upon the opinion of Inspector Reseter, that it was reasonably likely for injuries to occur as result

of shuttle car movement through the cited area damaging electrical cables lying along the rib line. According to Reseter, a damaged electrical cable could result in a short circuit and ignite pulverized coal. He added that if a fire should occur then smoke inhalation could result in fatalities. The Secretary argues that it is reasonable to infer that, if normal mining operations continued, electrical cables would be damaged. I agree with the Secretary's position which is supported by credible testimony and find that the violation was "significant and substantial" and of high gravity.

The Secretary also alleges that the violation was the result of the Respondent's "unwarrantable failure" to comply with the cited standard. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991).

In this regard, I have considered the large amount of accumulations and the significant history of the same type of violation on September 4, 1998, June 10, 1998, and July 29, 1998. These circumstances clearly warrant a finding of an aggravated omission constituting more than ordinary negligence and a serious lack of reasonable care. In reaching this conclusion I have not disregarded the testimony of the Respondent's witnesses that they had been unable to clean up the cited material because of equipment breakdowns and that they were in fact performing manual clean up when the inspector arrived. However, in light of the time during which the accumulations had existed, *i.e.*, since the previous afternoon shift on October 26th and since no coal had been produced on the midnight shift nor on the day shift on October 27th up to the time the inspector saw the violative conditions, I find the alleged mitigating factors insufficient. Since there is no dispute that there was no intervening clean inspection prior to the issuance of Order No. 7102307, it must be affirmed as a "Section 104(d)(2)" order.

Order No. 7102308, also issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.360 and charges as follows:

> The preshift exam conducted on 10/27/98, from the midnight shift to the day shift was not complete in that the severe coal spillage at the face area on 2 north panel was not entered in the book. This coal spillage occurred from the mining cycle from the afternoon shift on 10/26/98. Order No. 7102307 was
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> issued for said spillage. Also no dates, times or initials were found for the

midnight shift at the face area.[3]

The cited standard, 30 C.F.R. § 75.360, provides in subsection (f), as relevant hereto, that "a record of the results of each preshift examination, including a record of hazardous conditions and their locations found by the examiner during each examination . . . shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine."

I find that the failure of preshift examiner Ronnie Jarrell to have reported the accumulations in the preshift examiner's book constituted a violation of 30 C.F.R. § 75.360 as charged in Order No. 7102308. It is undisputed that the accumulations of coal at issue were created by mining that occurred before the midnight shift of October 27, 1999, and before Ronnie Jarrell would have conducted his preshift examination. Indeed, Jarrell himself admitted that he observed accumulations of coal spillage when he performed his preshift examination. He maintained only that he did not record the accumulations of coal because he believed they were not hazardous. As previously noted, I accept the credible expert testimony of Inspector Reseter as a "reasonably prudent person" regarding the hazardous nature of these particular accumulations.

This violation was also "significant and substantial" and of high gravity. The preshift examination and the reporting thereafter is intended, *inter alia*, to prevent hazardous accumulations from developing and to warn the miners on the oncoming shift about potentially hazardous conditions. By not reporting the hazardous accumulations of coal in the preshift book, the miners on the day shift were not placed on notice of these hazardous conditions and management could have overlooked or have been less inclined to clean up such unreported accumulations. It is reasonably likely for these consequences to lead to the serious injuries or fatalities previously described.

I also find that this violation was the result of "unwarrantable failure" and high negligence. Because of the massive size of the cited accumulations it cannot be inferred that the preshift examiner could have reasonably and in good faith concluded that these conditions were not hazardous. His failure to have reported these conditions was therefore the result of a serious lack of reasonable care and "unwarrantable failure." Since there is no dispute that there was no intervening clean inspection prior to the issuance of this order, it must likewise be affirmed as a "Section 104(d)(2)" order.

Considering Consol's large size, its history of violations in evidence, its undisputed good

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[3] At hearing the Secretary represented that she is not charging as a separate violation the failure of the mine examiner to have noted the date, time and his initials at the face area for the midnight shift.

faith abatement as well as the previous high gravity and negligence findings I conclude that the Secretary's proposed penalties are appropriate.

ORDER

Order Nos. 7102307 and 7102308 are affirmed. Consolidation Coal Company is hereby directed to pay civil penalties of $5,500.00 and $5,000.00, respectively for the violations charged in Order No. 7102307 and Order No. 7102308, within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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